STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN PROPERTIES, L.L.C.,

Plaintiff-Appellant,

v

CHIRCO TITLE COMPANY, LAWYERS TITLE INSURANCE CORPORATION, and FIDELITY NATIONAL TITLE INSURANCE COMPANY,

Defendants-Appellees,

and

COMERICA BANK,

Defendant.

UNPUBLISHED
January 3, 2012

No. 299588
Wayne Circuit Court
LC No. 09-007192-CK

Before: SHAPIRO, P.J., and WHITBECK and GLEICHER, JJ.

PER CURIAM.

Plaintiff, Michigan Properties LLC, purchased a gas station in the City of Detroit at a foreclosure auction. The property was encumbered by a lien in favor of Armada Oil and Gas, which was not settled and discharged until nearly two years after plaintiff's purchase. Plaintiff filed suit essentially alleging that Comerica Bank and defendant title companies (Chirco Title Company, Lawyers Title Insurance Corporation, and Fidelity National Title Insurance Company)[1] represented that the title would be "clear" at closing. Because the closing documents incorporated the purchase agreement's "as is" clause and extinguished any oral agreements, and because the defendant title companies actually defended and ultimately cleared plaintiff's title, we affirm the trial court's summary dismissal of plaintiff's claims.

[1] Chirco acted as agent for Lawyers Title in issuing the title insurance policy involved in this case. While this lawsuit was pending below, Fidelity acquired Lawyers Title and was added as a named defendant.

I. BACKGROUND

Non-party A & A Property Management owned a gas station on Livernois Avenue in the city of Detroit. It purchased the station with a secured loan from Comerica Bank and maintained its fuel supply through a mortgage arrangement with Armada Oil and Gas. Armada recorded its mortgage first even though it was not used to purchase the land. When A & A defaulted on its loan payments, Comerica sought the appointment of a receiver to protect its mortgage interest. The court appointed a receiver as requested and the receiver ultimately requested court permission to sell the gas station at auction. The court allowed the auction, the proceeds of which would satisfy A & A's debt to Comerica, but specifically provided that any sale conducted on Comerica's behalf would be subject to Armada's first-recorded lien.

Plaintiff entered the winning bid of $625,000 at the auction. In an affidavit, plaintiff's principal swears that "At the auction, it was said over and over that the owner would receive a free and clear title. Many other problems with the location were brought up and all they would say is this property 'as is' [sic] but we guarantee a free and clear title." At the time of sale, however, plaintiff signed a purchase agreement specifically stating that the property was being sold "on an AS IS and WHERE IS and WITH ALL FAULTS basis, without any representations or warranties related to the quality of title, the existence of liens, environmental issues or other matters." The purchase agreement limited Comerica's and defendants' liability for potential extraneous "promises": "Buyer hereby covenants and expressly waives any right of rescission and all claims for damages by reason of any statement, representation, warranty, promise, or agreement made by Seller, the Broker, and/or Comerica Bank, and the Title Company to Buyer." Plaintiff further agreed to release defendants from any future cause of action except for "those matters insured under" the owner's policy of title insurance.

On the date originally scheduled for closing, neither the Armada nor Comerica lien had been discharged. Plaintiff requested Chirco to investigate the issue of the outstanding liens and reschedule the closing. Plaintiff avers that, in early January 2008, he "received a phone call that all liens were discharged and removed from the title commitment and if [he did] not come in to sign [his] deposit would be kept." Plaintiff conceded to closing the sale on January 24, 2008. At that time, Chirco, acting as agent for Lawyers Title, issued an owner's title insurance policy benefitting plaintiff. Chirco insured plaintiff's claim of "[t]itle to the FEE SIMPLE estate or interest in the" gas station. The policy originally excepted from coverage any undischarged, prior recorded liens against the property. Chirco amended the policy before closing, however, to eliminate the coverage exception. Accordingly, the policy covered plaintiff against Armada's claimed lien over the property.

While plaintiff's purchase was still pending, Armada filed suit against Comerica and others seeking payment of the undischarged mortgage debt. Armada later added plaintiff as a named defendant. Upon plaintiff's notification of the suit, Chirco hired counsel to represent plaintiff and otherwise covered the costs involved in the litigation. In November 2009, Chirco finally settled the Armada lawsuit and discharged the mortgage. Although the defendant title companies had represented plaintiff's interests and ultimately cleared the title, plaintiff complained that the length of the litigation was unreasonable. As a result, plaintiff was unable to effectuate its plan to quickly resell the property at a profit.

Plaintiff filed suit against Comerica and the title companies, raising various breach of contract, fraud, and misrepresentation claims. The trial court summarily dismissed plaintiff's claims against Comerica and that order is not at issue in this appeal. The court subsequently granted summary disposition in favor of the defendant title companies because they defended plaintiff's title until clear and plaintiff unreasonably relied on any alleged oral representation that title would be cleared immediately.

II. STANDARD OF REVIEW

Defendants sought summary disposition pursuant to MCR 2.116(C)(8) and (10). Although the court cited (C)(8) in support of its order, it actually looked beyond the pleadings to the evidence presented. As such, we review the court's order as entered under (C)(10). *Krass v Tri-County Security, Inc*, 233 Mich App 661, 664-665; 593 NW2d 578 (1999). We review a trial court's decision on a motion for summary disposition de novo. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999) (internal citations omitted).]

We review underlying issues of contract interpretation de novo as well. *Citizens Ins Co v Pro-Seal Service Group, Inc*, 477 Mich 75, 80; 730 NW2d 682 (2007). We must apply the plain and unambiguous language of a contract as the document "reflects the parties' intent as a matter of law." *Hasting Mut Ins Co v Safety King Inc*, 286 Mich App 287, 292; 778 NW2d 275 (2009).

III. SUMMARY DISPOSITION OF CLAIMS AGAINST TITLE COMPANIES

Plaintiff challenges the trial court's dismissal of its breach of contract claims against the defendant title companies. In its second amended complaint, plaintiff accused defendants of breaching the title insurance policy issued in conjunction with this sale. The policy insured the transfer of "[t]itle to the FEE SIMPLE estate or interest" in the property. Defendants were aware of Armada's existing mortgage when issuing the insurance policy and when closing the real estate transaction. Following the sale, defendants actually defended plaintiff and Comerica against Armada's legal action to recover the outstanding mortgage debt. Plaintiff alleged that the defendant title companies breached the insurance policy by failing to clear the title of Armada's mortgage "in a reasonable diligent manner."

Plaintiff also accused defendant Chirco of breaching its contract to serve as the closer and settler of the real estate transaction. Plaintiff asserted that Chirco was required to ensure that plaintiff obtain the property "free and clear of all liens and encumbrances" and that Chirco breached that agreement by closing the sale before the Armada lien had been discharged.

Plaintiff further averred that Chirco misrepresented at closing that the property was being transferred with a clear title.

In its appellate brief, plaintiff argues only that it alleged a prima facie breach of contract claim in its complaint. Therefore, plaintiff challenges the court's dismissal of its claim under MCR 2.116(C)(8) for failure to state a legally cognizable claim. While the trial court cited (C)(8) in its order, the court relied on evidence beyond the pleadings and thereby dismissed plaintiff's claim under MCR 2.116(C)(10) for failure to create a genuine issue of material fact. See *Krass*, 233 Mich App at 664-665.

Even if plaintiff had properly presented its challenge to the summary disposition order, we would reject its claims of error. Plaintiff failed to create a genuine issue of material fact that defendants breached the title insurance policy. A title insurance policy "insur[es], guarantee[s], or indemnif[ies] against loss or damage suffered by owners of real estate . . . by reason of liens, encumbrances upon, defects in, or the unmarketability of the title to the real estate . . . ." MCL 500.7301(c). An owner's title insurance policy insures against loss or damage from:

- title to the estate or interest described . . . being vested other than as stated [in policy];
- any defect in or lien or encumbrance on the title;
- unmarketability of the title . . . . [1 Cameron, Michigan Real Property Law (3d ed), § 12.15, p 446.[2]]

Under the policy, the title insurer must "pay the costs, attorney fees, and expenses incurred in defense of the insured's title" up to the policy limits. *Id.*

Plaintiff's title insurance policy provided that defendants "at [their] own cost and without unreasonable delay, shall provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest of an insured . . . ." The policy gives defendants the "option" to simply tender the policy limit to the insured in lieu of defending the litigation or to settle with the adverse claimant.

Plaintiff presented no evidence that the defendant title companies breached the owner's title insurance policy. Defendants insured that title would vest free and clear upon closing. When the insured event did not occur and plaintiff filed a claim on its policy, defendants bore the cost of defending plaintiff's title and ultimately secured plaintiff's fee title interest. While the policy requires defendants to provide legal defense "without unreasonable delay," it does not dictate a reasonable length for the litigation. And the policy gives *defendants*, not the insured plaintiff, the *option* to tender payment to the insured in lieu of pursuing a defense. Defendants were within their contractual rights to defend against Armada's claim and complied with their contractual duties in this regard.

[2] The owner's title insurance policy issued to plaintiff contains identical language.

Plaintiff also failed to support its claim that Chirco violated its duties as the closing agent. Regardless of any implied or oral promises to transfer title free and clear of Armada's lien, plaintiff signed a "closing certificate" expressing that "it is accepting the sale of such property as contemplated by the [purchase agreement] in an 'as is, where is and with all faults' condition." Plaintiff agreed to take title "as is" and Chirco successfully cleared the title in plaintiff's favor. Plaintiff has not established any question of fact that Chirco breached its contractual duties.

Plaintiff further accuses the defendant title companies of fraud and misrepresentation based on their alleged oral promises that title would be transferred free and clear at the time of closing. Yet, plaintiff has failed to create a genuine issue of material fact regarding a necessary element for these alleged torts: reliance on alleged misrepresentations and promises. *Lawrence M Clarke, Inc v Richco Constr, Inc*, 489 Mich 265, 283-284; 803 NW2d 151 (2011) (reliance as element of fraud); *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 39, 41; 761 NW2d 151 (2008) (reliance as element of fraud and innocent misrepresentation); *Fejedelem v Kasco*, 269 Mich App 499, 502; 711 NW2d 436 (2006) (reliance as element of negligent misrepresentation). To support plaintiff's claims, its reliance on the defendant title companies' alleged representations and promises had to be reasonable. *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414-415; 751 NW2d 443 (2008) (reasonable reliance necessary to support fraud claim); *Rose v Nat'l Auction Group*, 466 Mich 453, 464-466; 646 NW2d 455 (2002) (reasonable reliance necessary to support fraud and misrepresentation claims). Where the parties' dealings are governed by a contract, a valid integration clause, which essentially extinguishes past promises, renders unreasonable a party's reliance on representations not included in the contract. *Hamade v Sunoco, Inc*, 271 Mich App 145; 721 NW2d 233 (2006); *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 504; 579 NW2d 411 (1998).

Regardless of any extraneous oral promises or representations made by the defendant title companies, plaintiff has not presented evidence of reasonable reliance in light of the parties' contractual agreement. As noted, the seller transferred title "as is." Through the purchase agreement, plaintiff "acknowledge[d] and agree[d] that . . . Comerica Bank [did not make] any agreements, representations or warranties, whether express or implied, or otherwise, regarding the condition of the Real Estate, . . . and/or any other fact or matter whether pertaining to the Real Estate or otherwise . . . ." Plaintiff entered a closing certificate specifically integrating the "as is" clause of the purchase agreement. The title insurance policy includes an integration clause: "This policy . . . is the entire policy and contract between the insured and the Company." "[W]hen a contract contains a valid merger clause, the only fraud that could vitiate the contract is fraud that would invalidate the merger clause itself." *UAW-GM*, 228 Mich App at 503-507. Plaintiff has not alleged fraud in the inducement of the integration clause. Therefore, under the circumstances, plaintiff cannot show reasonable reliance on any alleged representations by the defendant title companies.

Ultimately, defendants agreed to defend plaintiff's title, which they did. They breached no promise provided by contract and the trial court properly dismissed plaintiff's claims.

Affirmed.

/s/ Douglas B. Shapiro
/s/ William C. Whitbeck
/s/ Elizabeth L. Gleicher